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CORRESPONDENCE.

HOMESTEAD EXEMPTION—CAN IT BE WAIVED UNDER NEW CONSTITUTION?

To the Editors of the Va. Law Register:

It is suggested that it is not altogether clear that, under the new Constitution and laws passed in pursuance thereto, a householder can waive the homestead exemption.

There was no provision for waiver of homestead in the old Constitution. It was provided for by statute (secs. 3630 and 3647 of Code), and was held to be constitutional. *Reed v. Union Bank*, 29 Gratt. 723.

Among the reasons advanced by Mr. Minor for the constitutionality of the waiver statutes was that "the Constitution itself declares that nothing in the act in question shall be construed to interfere with the sale of the property exempted by virtue of any mortgage, deed of trust, pledge or other security thereon; and," continues Mr. Minor, "as no particular form of encumbrance is specified, it was competent to the legislature to allow it to be created through the medium of a waiver of exemption as well as otherwise." 4 Minor's Insts., p. 1005.

This particular provision, referred to by Mr. Minor, is not in the new Constitution and can no longer fortify an argument in favor of the constitutionality of the waiver.

But the language of the Constitution itself lends color to the view first suggested.

After providing, in section 192, that the General Assembly should prescribe the manner and the conditions on which a householder should set apart the homestead, section 193, seeking apparently to provide for the exercise of the exemption in the interval between the adoption of the Constitution and the action of the General Assembly theretofore provided for, provides that nothing contained in the article should "impair in any manner the right of any householder or head of a family existing at the time this Constitution goes into effect, to select the exemption, or any part thereof, to which he was entitled under the former Constitution: provided, that such right, if hereafter exercised, be not in conflict with the exemptions set forth in sections one hundred and ninety and one hundred and ninety one"—the inference being that but for this saving clause the right referred to would have been interfered with.

And it is further provided that—

"So far as necessary to accomplish the purpose of this section, the provisions of chapter one hundred and seventy-eight of the Code of Virginia shall remain in force until repealed by the General Assembly."

The purpose of the section was apparently to provide for the machinery of selecting the homestead, until the General Assembly should act, and, so far as necessary to accomplish that purpose and, inferentially, only so far, were the provisions of chapter one hundred and seventy-eight of the Code, in relation to the homestead, continued in force. What becomes of the other provisions of chapter one hundred and seventy-eight of the Code in

reference to the homestead, including section 3647, providing for the waiver, which evidently do not accomplish the purposes above alluded to? Are they not impliedly repealed by this constitutional mandate? And if they are so repealed, is it constitutional for the General Assembly to afterwards re-enact them?

As a matter of fact, the waiver statute has not been re-enacted.

Section 3630 has been amended and re-enacted to conform to the new Constitution (1902-3-4, p. 868) and, significantly enough, leaves out the seventh exception to the right of exemption, which provided that the exemption should not apply to "any debt or liability on contract, as to which the debtor or party to the contract has waived as hereinafter provided" (to-wit, in sec. 3647).

Section 3647 has not been interfered with by the General Assembly.

It seems that the Constitution, having provided for the homestead exemption, and made certain modifications in the conditions upon which the right could be exercised, goes further and completes the machinery by which it could be exercised by enacting the provisions of the Code on the subject, so far as necessary to accomplish the purpose of enabling a householder to avail himself of the homestead exemption, after the new Constitution went into effect. In other words, the Constitution contains a complete self-executing provision on the subject of the homestead, and does not provide for the waiver. The General Assembly not only did not provide for the waiver, but, in the Act which it did pass, left out the waiver provision in the old statute, which was re-enacted.

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